IN THE MISSOURI SUPREME COURT

IN THE INTEREST OF:

MARLIN DEVOINION ROBINSON

Supreme Court No. 85208

Audrain County Case No. JU102-8TC

LISA WILLIAMS,
APPELLANT

AUDRAIN COUNTY JUVENILE OFFICE
RESPONDENT,

JAY NIXON in his official capacity of
MISSOURI ATTORNEY GENERAL,
RESPONDENT,

MARLIN MATHEW ROBINSON (Father)
RESPONDENT.

BRIEF OF RESPONDENT
AUDRAIN COUNTY JUVENILE OFFICE

RESPECTFULLY SUBMITTED BY:

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JURISDICTIONAL STATEMENT

The Juvenile Officer adopts the Jurisdictional Statement provided by the Mother, Appellant herein.

POINTS RELIED ON

I. Section 211.447.2(1) R.S.Mo. which allows termination of parental rights for the reason that a child has been in foster care for at least fifteen of the most recent twenty-two months does not violate the due process clause of the Fourteenth Amendment of the United States Constitution and, therefore, the decision of the Trial Court should be affirmed.

II. The Trial Court did not err in terminating the mother's parental rights under Section 211.447.2(1) R.S.Mo. as it is a ground for termination of parental rights and, therefore, the decision of the Trial Court should be affirmed.

In the interest of C.W. and S.J.W., 64 S.W.3d 321, 324 (WD 2001)

In Re S.L.B. et al., 964 S.W.2d 504, 506 (WD 1998)

In the interest of M.R. and E.R., 894 S.W.2d 193, 195 (ED 1995)

Section 211.447.6 R.S.Mo.

In the interest of A.S.O., 52 S.W.3d 59, 64 (WD 2001)

ASFA (P.L. 105-89 Adoption and Safe Family Act of 1997)

Section 211.447.2(1) R.S.Mo.

Section 211.447.3 R.S.Mo.

Section 211.447.2 R.S.Mo.

Section 211.447.5 R.S.Mo

In the interest of K.C.M., 85.W.3d 682, 694 (WD 2002)

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In the interest of B.S.W., B.R.W. and B.J.W., 108 S.W.3d 36, 44 (SD 2003)

In interest of K.J.K., 108 S.W.3d 62, 67 (SD 2003).

Section 211.447.2(2) R.S.Mo.

Section 211.447.2(3) R.S.Mo.

Section 211.447.4 R.S.Mo.

Artman v. State Board of Registration for the Healing Arts, 918 S.W.2d 247, 251 (Mo banc 1996)

Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W.3d 10, footnote 21, (Sup Court 2003)

III. The Trial Court did not err in finding that the mother had abandoned her child under Section 211.447.4(1) R.S.Mo. as the decision of the Trial Court is supported by substantial evidence, is not against the weight of the evidence and does not erroneously apply the law and, therefore, the decision of the Trial Court should be affirmed.

In the interest of R.K., 982 S.W.2d 803, 806 (WD 1998)

In the interest of D.B. v. L.B.A., 916 S.W.2d 430, 434 (ED 1996)

In the interest of M.L.K., 804 S.W.2d 398, 402 (WD 1991)

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In the interest of M.P.W., 983 S.W.2d 593, 599 (WD 1999)

In the interest of B.A.F., 783 S.W.2d 932, 934 (WD 1989)

In interest of M.H., 828 S.W.2d 951, 955 (SD 1992)

IV. The Trial Court did not err in terminating the mother's parental rights under Section 211. 447.4(2) R.S.Mo. in that there was a prior adjudication of neglect and under Section 211.447.4(2)(d) R.S.Mo. mother did fail to provide for the child and, the decision of the Trial Court is supported by substantial evidence, is not against the weight of the evidence and does not erroneously apply the law and, therefore, the decision of the Trial Court should be affirmed.

Section 211.447.4(2) R.S.Mo.

Section 210.110(9) R.S.Mo.

Section 211.031.1(1)(b) R.S.Mo.

Section 211.447.4(2)(d) R.S.Mo.

Missouri Supreme Court Rule 88

In Re A.H., 9 S.W.3d 56, 60 (WD 2000)

In the interest of Q.M.B, 85 S.W.3d 654,660 (WD 2002)

V. The Trial Court did not err in terminating the mother's parental rights under Section 211.447.4(3) R.S.Mo. and the decision of the Trial Court is supported by substantial evidence, is not against the weight of the evidence and does not erroneously apply the law and, therefore, the decision of the Trial Court should be affirmed.

Section 211.447.4(3) R.S.Mo.

In the interest of A.S.O., 52 S.W.3d 59, 67 (WD 2001)

Section 211.447.4(3)(a) R.S.Mo.

Section 211.447.4(3)(b) R.S.Mo.

VI. The Trial Court did not err in terminating mother's parental rights under Section 211.447.4(6) R.S.Mo. as the underlying termination of parental rights orders were valid, final judgments which created an un-rebutted presumption that mother was unfit to be a parent and, therefore, the decision of the Trial Court should be affirmed.

Section 211.447.4(1) R.S.Mo.

Section 211.447.4(2) R.S.Mo.

Section 211.447.4(6) R.S.Mo.

In the interest of T.A.S., 32 S.W.3d 804, 815 (WD 2000)

In the interest of A.H., 9 S.W.3d 56, 60 and 61 (WD 2000)

In the interest of C.C., 32 S.W.3d 824, 830 (WD 2000)

Missouri Supreme Court Rules 75.01 and 119.07

Section 211.261 R.S.Mo.

Missouri Supreme Court Rule 74.06(b) and (d)

STATEMENT OF FACTS

Marlin Devonion Robinson was born on August 24, 2000, out of wedlock, at Audrain

Medical Center in Audrain County, Missouri (T 52). At the time of the child's birth the Mother was incarcerated by the Department of Corrections at the Women's Eastern Reception, Diagnostic and Correctional Center (WERDCC)in Vandalia, Missouri (T 54 and Exh 1). Mother named the child's Father as Marlin Mathew Robinson (T52); said putative Father at the time was also incarcerated by the Department of Corrections placed at South Central Correctional Center in Licking, Missouri (T 54, 62 & Exh 1). (Since neither the putative Father, Marlin Matthew Robinson, nor the unknown biological Father have appealed the Court's judgment, this Statement of Facts will not refer to the facts supporting the Trial Court's decision to terminate their parental rights.) The newborn child was taken into protective custody at the hospital on August 25, 2000, by the Juvenile Officer and placed with the Audrain County, Missouri Division of Family Services (hereafter referred to as "MDFS")for foster care (T 53). An adjudicational and dispositional hearing was held in Juvenile Court on November 21, 2000, and based upon the evidence presented, the court findings were as follows:

A. Said infant's mother is incarcerated and therefore unable to provide for his necessary care, custody, supervision and support, and she has requested Missouri Division of Family Services and Juvenile Court intervention to provide for her son's care.

B. Said infant's father is incarcerated and therefore unable to provide for his care, custody, support and supervision at this time.

The Court ordered Marlin a Ward of the Court and placed him in the custody of the MDFS for appropriate placement and treatment (LF Judgment dated November 21, 2000, Cause JU1-00-38J). MDFS contacts with the Mother in prison prior to the child's birth began at Mother's request as a plan for voluntary termination of parental rights to allow the child's

adoption (T 54). The Mother related this was her decision and the Father's as they felt this would be in the child's best interests. At the time of the child's birth though, the Mother changed her mind and requested foster care for the child (T 55). Marlin was placed in a Vandalia, Missouri, foster home nearby to the Mother in prison. At the time of removal, alternative placement options for the child were discussed with the Mother by the MDFS and she indicated there were no relative or kinship resources to be considered for him (T 55, 69 & 73).

Services were offered to the Mother by the Division of Family Services subsequent to Marlin's placement in foster care (JO Exh 3).

Weekly supervised one hour visits with the child and the Mother in prison were held from September 8, 2000, until a visit on October 22, 2000, when the Mother was "not on count" at the prison (it was learned later that she was in a court hearing in St. Louis) (T 56 & 60). Weekly visits resumed at the prison on November 12th following Mother's return and her telephone call on November 9, 2000, to Ms. Masek advising she was back at WERDCC and requesting to see the child (T 62). Mother's last visit with Marlin was held on February 11, 2001, just prior to her prison release (T 64). All visits between Mother and child were a result of the MDFS plan of the foster mother transporting the child to the prison for the visits. Mother had no responsibilities except to sign the initial prison visiting forms (T 57). Mother never requested the Juvenile Officer or MDFS to place the child with her upon her prison release (T 43, 44, 64), and she proceeded to return to St. Louis, Missouri, near her other children and family (T 64). Mother never saw Marlin again (T 64).

Audrain County MDFS caseworker, Lori Masek, testified that she mailed letters (JO Exh 5, 6, 7) in September, 2000 to both parents advising them of case meetings, requesting family information from the Father, and notifying them of their rights as parents, as well as sending them the booklet "Information for Parents of Children in Foster Care" (T 60, JO Exh 8). The Mother participated via tele-conference from prison in the initial permanency planning team meeting held on September 22, 2000, to develop the plan for her child (T 59).

Mother and Father were both notified by mail in March 2001 of another permanency planning team meeting on March 8, 2001 (JO Exh 10 & 11). Father did not respond at all to the letter. Mother arranged with Caseworker Masek to participate by telephone in the meeting, yet she was unable to be reached by four attempted telephone calls from the MDFS at the time of the meeting (T 66, 67). (Mother telephoned Caseworker Masek a few days after the March 8th team meeting apologizing for not being available by telephone for the meeting, saying she was out “job searching or job hunting” (T 67).) The team plan at the meeting began an effort by Audrain County MDFS to locate a foster placement for the child in the St. Louis area, nearer to the Mother (T 37 & 67, Exh. B). A search was made with assistance of St. Louis City MDFS caseworker Kevin McQuin, assigned to the Mother's four other children in foster care there. He contacted the two St. Louis foster families who had the other four children, but neither family wanted to have this child placed with them (T 67). The search also involved utilizing resources available through the Missouri Alliance of Jefferson City, as well as a statewide MDFS e-mail soliciting a foster home for him. Both

efforts were also unsuccessful in locating a St. Louis placement for the child (T 69 & 122). By way of "concurrent planning", Ms. Masek also attempted to locate a legal risk adoptive home in the St. Louis area to no avail (T 120, 121, 143). St. Louis City MDFS Caseworker Barbara Pelton confirmed that finding foster homes or bed space in a residential facility in St. Louis is difficult (T 169-172).

Mother's next contact with MDFS occurred when Mother called Caseworker Masek on June 12, 2001. Mother informed Caseworker Masek that she was in an automobile accident in March for which she was hospitalized for injuries and had physical therapy for six weeks. She also informed Ms. Masek that another of Mother's sons, Markeal Robinson, was also injured in the crash and was placed in foster care by the St. Louis City Juvenile Officer and MDFS after his hospitalization. Caseworker Masek knew Mother was confused on the month of the accident, as it actually occurred in May 2001 (T 70). Mother advised that she wanted to work towards reunification with Marlin and would not voluntarily relinquish her parental rights (T 71). Mother was offered assistance from the MDFS with transportation costs to Mexico for visits with the child by the use of gas vouchers (T 72). As a result of this telephone call, MDFS prepared a Written Service Agreement and sent it to Mother by letter dated September 18, 2001 (Exh 14). Also during this June 12, 2001 telephone conversation Ms. Masek informed Mother that the child needed a surgical consult. Ms. Masek advised Mother several days later, by telephone, that the child was scheduled for surgery on June 29, 2001, at the University of Missouri Hospital, and that she had rights and responsibility to attend that surgery (T 74). Mother did not come to the

surgery, nor did she telephone to inquire about the child's outcome from surgery (T 74,75). In fact, Mother did not inquire about the outcome of this surgery until almost a year later on May 14, 2002 when she was in court requesting the appointment of an attorney to represent her on the case at bar (T 91).

Another permanency planning team meeting was held September 5, 2001. The Audrain County MDFS notified both parents by mail (JO Exh 12, 13), but neither parent attended the meeting (T 77). The permanency planning team recommendation was that reunification of the child with his Mother and/or Father should no longer be the plan, rather that termination of parental rights proceedings were in his best interests; copies of the CS-1 form were procedurally mailed by MDFS to both parents; the CS-1 contained this recommendation (T 77, 78).

At the next permanency planning review meeting held on March 25, 2002, the recommendation remained termination of parental rights, again, neither parent attended and the form was mailed to both parents relating the case plan (T 85).

The Mother failed to comply with conditions of the Written Service Agreement (Exh 15) despite efforts of the MDFS and Juvenile Officer to assist her in remedying her situation (T 80-83). 1) Mother failed to maintain regular contact with MDFS. After her release from prison in February, 2001, Mother failed to participate in a PPT meeting on March 8, 2001 by telephone as previously arranged (T 59), she made no response nor attended the PPT meetings held on September 5, 2001, and March 25, 2002 (T 83), she had two telephone calls with MDFS in March, 2001 but did not ask for visits (T 65), she had one

telephone call with MDFS Caseworker Masek in June, 2001 but did not request a visit (T 70), and she signed the Written Service Agreement in October, 2001 and mailed it back to MDFS (T 80). This is the extent of her contact with MDFS between her release from prison in February, 2001 and her court appearance on May 14, 2002 seeking appointment of counsel to represent her in this TPR case (T 89). Mother did speak with the Juvenile Officer by telephone on May 6, 2002 regarding service of court summons, but did not request a visit with Marlin (T 30). 2) Mother failed to keep MDFS informed as to her location, addresses and employment. (T 133) Evidently, Mother lived in St. Louis, Missouri in a half way house, and with her mother, and with her sister at 3717 Virginia Street, and later with her brother at 3209 Nebraska Street (T 64, 65). Not all of these residency changes were reported to Caseworker Masek (T 65, 81, 89). In fact, MDFS and the Juvenile Officer expended great efforts to locate Mother for service of the TPR Petition (T 26-29). 3) Mother agreed to abide by the conditions of her probation, but failed to follow through on that as, at the time of the TPR hearing, Mother was placed back in the Department of Corrections facility in Vandalia, Missouri for a probation violation (T 82). 4) Mother agreed to submit to random urine analysis and make those results available to MDFS and to sign a release of information allowing her probation officer to discuss her case with MDFS. Mother never provided any information with regard to urine analysis testing, she did not sign a release of information and Mother's parole officer never contacted MDFS. 5) Mother agreed to visit with the child on a regular basis, but she actually never saw him again after February 11, 2001, nor did she ever request another visit

(T 95). Weekly visits were available to Mother (T 72, 117).

6) Mother also agreed to maintain contact with Marlin in a number of ways, such as video/audio taped recordings, cards, letters, and other such means, but none of these items were ever received by MDFS. 7) Finally, Mother agreed to participate in person or by telephone in all MDFS meetings and court hearings concerning Marlin. During the entire time that he has been in foster care, Mother only participated in one team meeting in September, 2000 while she was in prison, and attended a court hearing in May, 2002 to request the appointment of an attorney in this TPR case (T 91).

Throughout the entire time the child was in foster care since his birth, Mother contributed no gifts, clothing, cards, phone calls or letters to him (T 53, 95). On April 15, 2001, Mother was administratively ordered to pay $105.00 per month for child support (Judicial Notice Order dated March 30, 2001, IV-D Case No. 90839264). Although the Mother had monetary resources while in prison ($1,485.00 flowed through her prison account from April, 2000 to February, 2001 Exh. 1), and was, at times, gainfully employed following her release, earning $5,954.00 between her release from prison on February 21, 2001, until her incarceration on August 15, 2002 and drawing approximately $540.00 in food stamps during this same period (JO Exh 1, 2 & 4), she voluntarily contributed nothing for this child's care and support (T 95, 96). She only contributed $ 169.96 through income withholding (JO Appendix A). During this time period she did have enough money to send the child’s Father $200.00 for his prison spending account (Exh 1 & 2).

The Mother submitted to a psychological examination September 20, 2001, in connection with her St. Louis City Court children's cases (Exh D, T 128), but there were factual inconsistencies with information she provided the examiner so it was considered invalid (T 163, 164). Her full scale IQ was measured at 70 and the exam indicated she functioned at a grade school level. The Mother never requested St. Louis City MDFS to assist her with transportation or services relating to her child placed in care in Audrain County (T 187). In fact, Mother never discussed Marlin with her St. Louis City MDFS caseworker (T 187). Ms. Barbara Pelton, caseworker for St. Louis City MDFS, testified that Mother's three older children, Jasmine Robinson, Daneisha Robinson and Travion Robinson, were placed with Family Services in foster care in 1998 (T 156). The fourth child, Markeal Moran Robinson, was placed in foster care on May 15, 2001, following an automobile accident where he was a passenger in the car with Mother (T 156, 158). Ms. Pelton indicated that MDFS had provided services to Mother since 1998 (T 155). Requirements of St. Louis City MDFS in 1999 for the Mother and Father to get their children home were to look for housing, to enroll in parenting class, to get drug assessments, and to find employment (T 157). The only task satisfactorily fulfilled was the Mother obtaining a drug assessment, but it was invalid due to incorrect information provided to the assessor as Mother only admitted to alcohol abuse (T 160). Caseworker Pelton testified that both parents had drug related convictions. When Markeal was taken into custody, the St. Louis City Court required Mother to: 1) visit one time per month (she had 12 visits between May, 2001 and February, 2002, and she never visited the child after

February 6, 2002 nor had any contact with St. Louis City MDFS after February, 2002); 2) submit to drug testing upon request (MDFS requested a test on January 23, 2002 and she did not comply until February 1, 2002); 3) complete a substance abuse evaluation (she was not truthful); 4) obtain and maintain housing (in December, 2001 she had an apartment with her brother, by February, 2002 she owed $800.00 in back rent and by April, 2002 she was back in prison); 5) complete a parent skills training course (she attended Parents as Teachers while in prison); 6) have family planning counseling (she did not); 7) undergo a psychological evaluation (she was not truthful); and 8) follow the recommendations of the psychological evaluation (T 161, 162). Services offered to Mother by St. Louis City MDFS were arranging visits; referrals to substance abuse treatment, parenting classes, housing and employment; as well as the psychological evaluation and drug testing (T165, 166). Parental rights were involuntarily terminated as to the Mother over her three children, Daneisha Misha Robinson, Travion Jamal Robinson and Jasmaine Natasha Williams, in St. Louis City Family Court on May 7, 2001, to allow for their permanency by adoption (T 156, 185 and Judicial Notice Judgments in Cause No. JU005-00347A).

Audrain County Juvenile Court held a permanency review hearing in Marlin's cause on September 11, 2001, for which both parents were duly notified, but both failed to appear or participate (Judicial Notice Judgment dated September 11, 2001). The Court found that the Mother had not visited with the child for over six months since her release from prison in February 13, 2001, nor had she contributed any child support. The Court relieved the Division of Family Services from making further reasonable efforts toward returning the

child to the home as it was inconsistent with establishing a permanent placement for the child, and that the permanency plan was adoption with commencement of termination of parental rights proceedings by the Juvenile Officer.

Caseworker Lori Masek testified that Marlin has been in foster care since his birth following discharge from the hospital. She knew of no additional services that could be offered to the parents to bring about a lasting parental adjustment enabling a return of the child to the home of his Mother or Father in the near future (T 102). She testified that the child has no emotional ties to his Mother, to his Unknown Biological Father, or to his Putative Father (T 53, 99). The child's Mother and Father have failed to adjust their circumstances and conduct to provide a proper home for the child despite efforts from the Division of Family Services to promote this (T 102).

Caseworker Masek testified that the child's Mother is unfit to be his parent based on her failure to visit him after February 11, 2001, thus indicating her lack of commitment to him and disinterest in reunification, and her failure to attend his surgery or even inquire of his health, her failure to inquire about the child's whereabouts, the involuntary termination of her rights to her other four children, and her arrest and return to incarceration (T 99, 100).

Approximately 19 months after Marlin came into foster care, on April 1, 2002, the Juvenile Officer filed a Petition to Terminate Parental Rights of his Mother, Putative Father and Unknown Biological Father (LF 57). The Mother appeared for hearing on May 14, 2002, and requested the Court appoint her legal counsel, and the cause was continued (LF

2). She did not request a visit with the child at the time of the hearing (T 91). An evidentiary hearing was held on January 24, 2003 and the Court thereafter entered it's order terminating the parental rights of all three parents (LF 2, 30). This appeal by Mother follows.

ARGUMENT

POINT I

SECTION 211.447.2(1) R.S.MO. WHICH ALLOWS TERMINATION OF PARENTAL RIGHTS FOR THE REASON THAT A CHILD HAS BEEN IN FOSTER CARE FOR AT LEAST FIFTEEN OF THE MOST RECENT TWENTY-TWO MONTHS DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND, THEREFORE, THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

The Juvenile Officer adopts the argument contained in the Brief submitted by the Missouri Attorney General's Office addressing this Point Relied On.

POINT II

THE TRIAL COURT DID NOT ERR IN TERMINATING THE MOTHER'S PARENTAL RIGHTS UNDER SECTION 211.447.2(1) R.S.MO. AS IT IS A GROUND FOR TERMINATION OF PARENTAL RIGHTS AND, THEREFORE, THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

STANDARD OF REVIEW AND BURDEN OF PROOF.

In each of Mother's Points Relied On, she addresses the standard of appellate review and the burden of proof. The Juvenile Officer agrees, in general, with those statements and agrees that the standard and burden are the same with regard to all issues raised by Mother in Point II through Point VI of her Brief. In addition to the standards contained in Mother's Brief, the Appellate Courts have also ruled that "the trial court's judgment will be sustained if it is in the best interests of the child and the termination is supported by clear, cogent and convincing evidence ... The facts and reasonable inferences therefrom are reviewed in the light most favorable to the trial court's judgment with due regard given to the trial court's determination of witness credibility." In the interest of C.W. and S.J.W., 64 S.W.3d 321, 324 (WD 2001). The best interest of the minor child is always the court's utmost concern in a termination of parental rights case. In Re S.L.B. et al., 964 S.W.2d 504, 506 (WD 1998) and In the interest of M.R. and E.R., 894 S.W.2d 193, 195 (ED 1995). Furthermore, "If clear, cogent and convincing evidence of any one of the statutory grounds supporting the judgment is shown in the record in addition to a finding that termination is in the best interests of the children pursuant to Section 211.447.6 R.S.Mo., the judgment will be

affirmed." In the interest of A.S.O., 52 S.W.3d 59, 64 (WD 2001).

ARGUMENT - POINT II

The Juvenile Officer agrees with Mother that our TPR statute was amended in 1998 to comply with the provisions of ASFA (P.L. 105-89 Adoption and Safe Family Act of 1997). One of the purposes of the ASFA Law is to provide permanency for children and to eliminate long term foster care and thus, encourages termination of parental rights to move children away from foster care and into permanent adoptive homes. Section 211.447.2(1) R.S.Mo. and Section 211.447.3 R.S.Mo. were enacted in order to allow Missouri to be compliant with the ASFA Law.

Mother argues that Section 211.447.2(1) R.S.Mo. (fifteen out of twenty-two months) is not a "ground" for the termination of parental rights, but only sets out a procedure for when TPR may be filed. Mother cites no authority for this position. Section 211.447.2(1) R.S.Mo. requires the Juvenile Officer to file a Petition for Termination of Parental Rights when the child has been in foster care for fifteen of the most recent twenty-two months. Section 211.447.3 R.S.Mo. specifically refers to the subfactors of Section 211.447.2 R.S.Mo. as "grounds" for termination of parental rights as does Section 211.447.5 R.S.Mo. Clearly, the Legislature considered the fifteen out of twenty-two months to be a "ground" for termination of parental rights based upon the unambiguous wording of Section 211.447.3 R.S.Mo. and Section 211.447.5 R.S.Mo. Additionally, numerous Missouri Appellate Court cases indicate that the "fifteen out of twenty-two months" standing alone is sufficient to be a ground for termination of parental rights. See

In the interest of K.C.M., 85.W.3d 682, 694 (WD 2002), In the interest of M.J. and C.J., 66 S.W.3d 745, 748 (SD 2001), In the interest of A.S.O., 52 S.W.3d 59 (WD 2001), In the interest of J.J.P., ____ S.W.3d _____, 2003 Mo.App. LEXIS 1091,5 (SD 2003) and In the interest of B.S.W., B.R.W. and B.J.W., 108 S.W.3d 36, 44 (SD 2003), In interest of K.J.K., 108 S.W.3d 62, 67 (SD 2003).

Mother bolsters her argument that Section 211.447.2(1) is not a TPR "ground" by citing the fact that this statutory subsection does not contain the word "ground". Yet, on pages 46, 47 and 50 of Mother's Brief, she admits that Section 211.447.2(2) R.S.Mo. (abandonment of an infant) and Section 211.447.2(3) R.S.Mo. (murder, manslaughter, etc.) are grounds for termination of parental rights. The Juvenile Officer would point out that the abandonment and murder subsections do not contain the word "ground" either. Missouri law tracks the Federal law cited by Mother on page 49 of her Brief whereby the fifteen out of twenty-two months, abandonment, murder, manslaughter, etc., all mandate the filing of a TPR petition. The Federal law makes no distinction between abandonment and murder being a "ground" and fifteen out of twenty-two months being a "procedure" as argued by Mother. Likewise, the Missouri statute does not make such a distinction. Only Section 211.447.4 R.S.Mo. subparagraphs are referred to by an introductory paragraph as "grounds" for termination of parental rights. If Mother's argument is accepted, then a parent's murder of a child's sibling or a parent's abandonment of an infant would not be "grounds" for filing a termination of parental rights against a child's parent because subsections 211.447.2(2) and 211.447.2(3) R.S.Mo. do not contain statutory language designating murder of a

sibling or abandonment of an infant as a TPR "ground". Obviously, such a result is not what the Legislature intended and Mother's argument is without merit.

Mother further cites numerous cases indicating that statutory wording must be harmonized in order to bring meaning to a statute so that the statute is interpreted to be constitutional. There is no need to "harmonize" Section 211.447.2 R.S.Mo., Section 211.447.3 R.S.Mo. or Section 211.447.5 R.S.Mo. as the statutes are not in conflict with one another.

Finally, Mother reasserts her Point I argument that the references in Section 211.447.3 R.S.Mo. and Section 211.447.5 R.S.Mo. to the fifteen out of twenty-two months as being a "ground" for termination of parental rights is a scrivener's error because if it is not, then the fifteen out of twenty-two months must be considered a ground for termination of parental rights and if the statute is so construed, the statute is unconstitutional. The Juvenile Officer refers the Court to the Attorney General's argument in connection with Point I of the Brief and asserts that making "fifteen out of twenty-two months" a ground for termination of parental rights does not render the statute unconstitutional. Additionally, Mother never raised the issue of a "scrivener's error" at the trial court level and is now prohibited from raising this issue for the first time during this appeal as said issue has not been preserved for review. Artman v. State Board of Registration for the Healing Arts, 918 S.W.2d 247, 251 (Mo banc 1996) and Missouri Soybean Association v. The Missouri Clean Water Commission, 102 S.W.3d 10, footnote 21, (Sup Court 2003).

POINT III

THE TRIAL COURT DID NOT ERR IN FINDING THAT THE MOTHER HAD ABANDONED HER CHILD UNDER SECTION 211.447.4(1) R.S.MO. AS THE DECISION OF THE TRIAL COURT IS SUPPORTED BY SUBSTANTIAL EVIDENCE, IS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND DOES NOT ERRONEOUSLY APPLY THE LAW AND, THEREFORE, THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

Mother argues that she did not voluntarily abandon Marlin as she was prevented from visiting with him because DFS failed to provide her with services. Mother's definition of abandonment as contained on page 54 of her brief is incomplete. The Court in In the interest of R.K., 982 S.W.2d 803, 806 (WD 1998) states that "... abandonment is defined as voluntary and intentional relinquishment of custody of the child with the intention that the severance be of a permanent nature OR as the intentional withholding by a parent of his care, love, protection and presence without just cause or excuse" (cites omitted, emphasis added).

The child was taken into protective custody at birth and placed in foster care because the Mother was incarcerated by the Department of Corrections. (T 53, 54). While she was incarcerated, Mother had regular weekly supervised one hour visits with the child as the result of the foster mother transporting the child to the prison for the visits. Obtaining visitation with the child while she was in prison required Mother to take no affirmative actions. (T 56, 57). There was a short interruption in Mother's visits in October and

November of 2000 as she was transferred out of the Vandalia facility for a short period of time. Evidently, visitation with Marlin was not a priority in Mother's life as she did not notify the Missouri Division of Family Services that she was leaving the Vandalia facility, and only notified the Division of Family Services that she had returned to the Vandalia facility after receipt of the caseworker's letter informing her that there would not be any more visits until DFS was notified of Mother's return to the Vandalia facility. (T 56, 60, 62). Mother's last visit with the child was held at the prison in Vandalia in February of 2001 just prior to her release. (T 64). Mother never saw the child again. (T 64). Mother never requested the Juvenile Officer or the Division of Family Services to place the child with her upon her release from prison (T 43, 44, 64). Mother never asked for another visit with the child (T 95). Mother knew the child was located in an Audrain County foster home yet, when she was released from prison, she proceeded to relocate to the St. Louis, Missouri area, approximately 150 miles away from the child. (T 64).

Mother alleges that she did not voluntarily abandon the child, but that she was prevented from visiting with the child because the State did not move the child closer to the St. Louis area. Because of Mother's decision to relocate to the St. Louis area, the permanency planning team, as a result of a meeting held on March 8, 2001, decided to try to relocate the child to the St. Louis area by finding a foster home close to Mother. (T 37, 67). Thus began a search by Audrain County DFS to find a foster home in the St. Louis area. Caseworker Masek contacted Mother's St. Louis caseworker, who in turn contacted the two families who had Mother's other four children in foster care, but neither family wanted to

have this child placed with them. (T 67). Audrain County Caseworker Masek also searched for a foster home through the Missouri Alliance of Jefferson City as well as placing a statewide Family Services e-mail soliciting a foster home, all to no avail. (T 69, 122). Caseworker Masek also attempted to locate a list of legal risk adoptive homes in the St. Louis area to no avail. (T 120, 121, 143). St. Louis City DFS Caseworker Pelton confirmed that finding foster homes or bed space in a residential facility in the St. Louis area is difficult. (T 168-172). Mother voluntarily chose to relocate to the St. Louis area and although Audrain County DFS used more than reasonable efforts to find a home for the baby in the St. Louis area, they were unsuccessful. Mother provided no help to DFS in finding a placement in the St. Louis area as she repeatedly indicated that there were no relatives or kinship resources to be considered for the baby. (T 55, 69, 73). DFS can not magically produce foster homes for children. It would have been much easier for Mother to have found a home in the Audrain County area than it was to find a home for Marlin in the St. Louis area. Mother voluntarily made this choice to move away from the child and DFS cannot be faulted for failure to manufacture a home for the baby in the St. Louis area.

Mother alleges that she did not voluntarily abandon the child because the State did not help her with travel and did not take the child to St. Louis to visit Mother. Once again, it was Mother's voluntary choice that placed 150 miles between her and the baby. However, Audrain County DFS did offer to give Mother a gas voucher to reimburse her for gas if she would travel to Audrain County to visit with Marlin. (T 72). Mother never took advantage of this offer. Caseworker Masek testified that she told Mother she was willing to research

ways of DFS transporting the child to St. Louis to visit with Mother, but Mother never called to make arrangements for the visit. (T 122, 123). Audrain County DFS did not know where Mother was located during much of the time that Marlin was in foster care (T 89). How was Audrain County DFS to arrange visits between Mother and Marlin in St. Louis without Mother's cooperation?

Next, Mother argues that the Division's failure to provide services to Mother excuses her abandonment of the child. As can be seen by case law, even if DFS offers no services to a parent, that fact is not a defense to a TPR action. In the interest of D.B. v. L.B.A., 916 S.W.2d 430, 434 (ED 1996). However, DFS did provide services to Mother (JO Exh. 3). Audrain County DFS provided transportation to and from visits while Mother was in prison, had a caseworker available to assist Mother, offered Mother the ability to make collect calls to talk with her caseworker, offered to perform homestudies on relative/kinship providers suggested by Mother, offered gas vouchers and offered to research ways of bringing Marlin to St. Louis for a visit.

Additionally, Mother was being provided services by St. Louis City DFS workers and had been provided with such services since 1998 when three of her other children came into care (T 155, 156). Since then, St. Louis City DFS had been encouraging Mother to obtain housing, get drug treatment and find employment. (T 157). Evidently, when Mother was released from prison in February, 2001, she obtained custody of a fifth child, Markeal. (Three children, Jasmaine, Daneisha and Travion, were in the custody of St. Louis City DFS

and Marlin was in the custody of Audrain County DFS). The record does not disclose where Markeal was living while Mother was in prison, but evidently, Mother had found a private resource who was available to care for him although she could not suggest a private resource for Marlin. In May, 2001, approximately three months after her release from prison, she lost custody of Markeal (T 70), so not only was Mother unwilling to regain custody of Marlin, she placed Markeal in a life threatening situation and lost custody of him. (T 156, 158). Mother ignores the fact that she was unable to appropriately care for Markeal while he was in her custody and instead, maintains that she "made progress" in having him returned. St. Louis City Caseworker Pelton tells a different story. After Markeal came into care, St. Louis City DFS encouraged Mother to visit with Markeal who lived in the same city with Mother but from May, 2001 to February, 2002, Mother only had twelve visits with that child. Mother never visited with Markeal after February 6, 2002 nor did she have any contact with St. Louis City DFS after February, 2002 although she lived in the same community and was, by court order, permitted unsupervised visits with him (T 179). While Markeal was in care, Mother continued to have substance abuse issues, continued to remain unable to maintain stable housing, and did not provide truthful information in her psychological evaluation (T 161, 162). St. Louis City DFS referred Mother to substance abuse treatment, parenting classes, housing and employment, and provided her with a caseworker as well as visits with Markeal (T 165, 166). Mother alleges, without transcript citations, that Caseworker Pelton testified that Mother was ineligible for reunification services because she did not have stable housing. (Mother's Brief Page 57).

This is a mis-characterization of Caseworker Pelton's testimony. On pages 168 and 169 of the transcript, Caseworker Pelton testified in cross examination that a special program of intensive in-home supervision and reunification is available, but that in order to take advantage of this specialized program, a parent must have housing and because Mother never had stable housing, she was never eligible to participate in this particular program. Caseworker Pelton never testified that Mother was ineligible for reunification services. It is true that St. Louis City DFS did not specifically assist Mother in visiting with Marlin as Mother was so disinterested in Marlin that she never requested such assistance (T 168, 169, 187).

Mother argues that her abandonment should be excused because she received "conflicting messages" from DFS and the Court. The September, 2001 court order allowed DFS to cease reasonable efforts and directed the Juvenile Officer to file a TPR Petition. (Mother's Exh. A, pg 4). Also in September, 2001, Mother received a Written Service Agreement from Caseworker Masek offering visits. Mother did not call Audrain County DFS, did not seek clarification from her St. Louis City caseworker and she did not write DFS to clarify any issues about which she might have been "confused". The conclusion that can be drawn from her failure to clear up her "confusion" is that she was disinterested in the child. Mother cites that an additional reason for her "confusion" is that Marlin's alleged father called to arrange visitation with the child and was told by the Juvenile Officer that parental visits had been terminated. The call referred to occurred a few days prior to the filing of the TPR Petition on March 29, 2002 (T 25) and cannot excuse Mother's failure to

visit for the fourteen months preceding that telephone call. Also, when Mother expressed her understanding that her rights had previously been terminated to the Juvenile Officer and DFS at the first TPR court appearance in May, 2002, she did not even request a visit at that point in time, did not inquire about the child's current status, nor did she even request a picture of the child (T 91, 92). If in fact she was confused, Mother showed no interest between February, 2001 and May, 2002 in clarifying her status with regard to Marlin.

Mother argues that her low IQ excuses her abandonment of the child. Mother's psychological evaluation showed a full scale IQ of 70 and that she was functioning at the low end of Borderline Intellectual Range/high end of Mental Retardation Range, a fact which the examiner did not feel disqualified her from parenting Markeal (Mother's Exh. D). There is no evidence that Mother could not understand what was happening to her and her children. She had five children in the foster care system. She had a caseworker available in Audrain County and a caseworker available in St. Louis City. She had a parole officer available. Caseworker Masek explained the Division's expectations for Mother in the June, 2001 phone call and there was no indication that Mother did not understand these basic expectations. Responsibility, concern and love, not IQ, drive parents to visit with and provide a home for their children, all three of which were qualities Mother simply lacked.

Mother next argues that her "dire" financial situation was an excuse for her abandonment. Mother did hold employment after her release from prison (JO Exh.4). Mother had enough money to send Father $200.00 for his prison spending account, to send Youlanda Williams $75.00 and to send Mr. Robinson's mother, Birdie Moore, $365.00 (JO

Exh. 1 & 2). Even incarcerated parents who earn less than $10.00 a month in income are expected to contribute toward their children's support. In the interest of M.L.K., 804 S.W.2d 398, 402 (WD 1991), In the interest of R.K., 982 S.W.2d 803, 806 (WD 1998), and In the interest of M.P.W., 983 S.W.2d 593, 599 (WD 1999). There is no evidence before the Court showing that Mother was unable to hold a job and her failure to find and maintain stable employment is not the fault of the Division. Mother's sole contribution to the child for the entire time the child was in care was $169.96 obtained through an income withholding pursuant to an Administrative Order. (See Appendix 1 - The Juvenile Court took judicial notice of this pay history but it was not included in the judicial notice documents which Mother provided to this Court. T-11)

Mother's argument also ignores her criminal history. Mother's voluntary act of committing a crime resulted in her incarceration at the time of the birth of Marlin. Mother was pregnant when she entered the Department of Corrections on April 28, 2000 as she gave birth to Marlin on August 24, 2000 (JO Exh 1, pg. 7). Mother was released from prison in February, 2001 (JO Exh.1, pg 8). Based on a voluntary act of Mother, she was re-incarcerated because of a parole violation in August, 2002 (JO Exh. 1, pg 6). She was in prison at the time of the hearing (LF, pg 2). Mother chose a life of irresponsibility and crime over the choice of being a law-abiding citizen who could be available to provide a home for her child. Missouri case law provides that continued violation of the laws in the State of Missouri resulting in incarceration can be a factor in deciding whether or not a parent abandoned the child. In the interest of B.A.F., 783 S.W.2d 932, 934 (WD 1989).

Furthermore, Missouri case law indicates incarceration does not excuse a parent from the parent's statutory obligation to provide a child with a continuing relationship. In the interest of R.K., 982 S.W.2d 803, 806 (WD 1998) and In interest of M.H., 828 S.W.2d 951, 955 (SD 1992).

Mother certainly intentionally withheld her care, love, protection and presence from the child without just cause or excuse. Mother never saw the child after her release from prison in February, 2001, never requested a visit with the child after that date (T 95), never sent the child any gifts, clothing, cards or letters (T 53, 95), never had any phone calls with the child and only provided a token amount of support (T 53, 95). Mother's sole contact with the Audrain County Missouri Division of Family Services after her release from prison in February, 2001 consisted of two phone calls in March, 2001, one phone call in June, 2001, and mailing back a Written Service Agreement in October, 2001. The Trial Court had ample evidence before it to determine that Mother abandoned Marlin.

POINT IV

THE TRIAL COURT DID NOT ERR IN TERMINATING THE MOTHER'S PARENTAL RIGHTS UNDER SECTION 211. 447.4(2) R.S.MO. IN THAT THERE WAS A PRIOR ADJUDICATION OF NEGLECT AND UNDER SECTION 211.447.4(2)(d) R.S.MO. MOTHER DID FAIL TO PROVIDE FOR THE CHILD AND, THE DECISION OF THE TRIAL COURT IS SUPPORTED BY SUBSTANTIAL EVIDENCE, IS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND DOES NOT ERRONEOUSLY APPLY THE LAW AND, THEREFORE, THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

In order to terminate parental rights under Section 211.447.4(2) R.S.Mo., the Court must find that the child has been abused or neglected. The Court, in the case at bar, found on page 2 of its order (LF 31) that the court adjudicated that the child had been abused or neglected on November 21, 2000 in cause number JU100-38J. The November 21, 2000 Court Order made the child a ward of the court based upon a finding that "said infant's mother is incarcerated and therefore unable to provide for his necessary care, custody, supervision and support, and she has requested Missouri Division of Family Services and Juvenile Court intervention to provide for her son's care. (Judicial Notice #2). Mother asserts that this November 21, 2000 finding of the Trial Court is not a finding that Mother neglected the child. Section 210.110(9) R.S.Mo. defines neglect as the "failure to provide, by those responsible for the care, custody, and control of the child, the proper or necessary support, education as required by law, nutrition or medical, surgical, or any other care

necessary for the child's well being". Mother's voluntarily acts placed her in prison while she was pregnant. Mother had not made arrangements with anyone to care for the baby at his birth and had no suggestions for DFS as to relative or kinship resources for the care of Marlin although obviously, Markeal was living with someone while Mother was in prison as she resumed his physical custody when she was released. Mother argues that the placement of the child into foster care was a responsible action by Mother when, in fact, the foster care placement was made necessary because Mother failed to provide for his care and custody. Further, the November 21, 2000 Order on page 2 found that the child fell within the purviews of Section 211.031.1(1)(b) R.S.Mo. This section of the law vests exclusive jurisdiction in the Juvenile Court over a child who is "otherwise without proper care, custody or support", reaffirmation that the child was neglected by Mother at his birth. There is simply no way for a child to be without "proper care, custody and support" other than for a parent to have neglected or abused the child. Thus, the November 21, 2000 finding of the Trial Court is a finding that the child had been neglected.

Next, Mother goes on to challenge the Trial Court's findings under Section 211.447.4(2)(d) R.S.Mo. dwelling on what Mother describes as her financially precarious situation. The facts are that Mother, although financially able to provide for the child, failed to do so. Mother has never provided the child with any gifts, clothing or cards even though he has been in foster care since his birth. (T 53, 95). On April 15, 2001, Mother was administratively ordered to pay $105.00 per month for child support (Judicial Notice Exh. 1). Although the Mother had monetary resources while in prison with $1,485.00 flowing

through her prison account from April, 2000 to February, 2001 (JO Exh. 1) and, was, at times, gainfully employed following her release from prison earning $5,954.00 between her release date from prison in February, 2001 until her incarceration in August, 2002, and additionally drew approximately $540.00 in food stamps during the same time period (Juvenile Office Exh. 1, 2 and 4), she voluntarily contributed nothing for this child's care and support (T 95, 96), and only contributed $169.96 through income withholding (See Appendix A). During this time period, she did have enough money to send Father $200.00 for his prison spending account (Exh. 1 & 2) and to send Father's mother the sum of $365.00 out of her prison spending account. (Exh. 1 & 2). As set forth in Point III above, even incarceration does not excuse a parent from her obligation to support her child.

Mother attacks the Division of Child Support Enforcement Administrative Order (Judicial Notice 1) saying that there was no evidence presented that Mother ever received a notice of the finding, that the basis of the finding was never explained and a Form 14 was not attached. Money was withheld involuntarily through a wage withholding from Mother's wages and, thus, at some point in time, she certainly had notice of the finding. The Administrative action which was never contested by Mother is a final order. Certainly it cannot be argued that $105.00 a month in child support is anything other than a bare minimal amount of child support. Under the child support guidelines developed under Missouri Supreme Court Rule 88, a parent who pays $100.00 a month in child support would be expected to earn approximately $5.20 an hour for a 40 hour work week ($900.00 per month). There is nothing in the record to indicate that Mother was unable to hold a full

time job making minimum wage. In the absence of evidence that a parent is incapable of employment, a parent can be considered financially able to support a child. In Re A.H., 9 S.W.3d 56, 60 (WD 2000).

Next, Mother argues that the entry of an Administrative Order for support is counter productive for reunification of the child with the Mother as she should be using her funds to provide a home, gifts and clothing for the child rather than to reimburse the State for his care. This argument is moot in the case at bar as Mother did neither. Mother provided no voluntary support, only provided $169.96 through income withholding, never bought the child a gift, never bought an article of clothing and did not provide a stable home for herself much less for Marlin.

Mother argues that during the time that she was not incarcerated, she did not have enough money to provide for her own needs, to establish a home and to provide for Markeal, much less have enough money to provide child support, clothing, gifts, a home or other items for Marlin. Mother had a duty to support Marlin, the opportunity to be employed, a caseworker who referred her to employment resources and the ultimate decision making power over the expenditure of her funds. Marlin was not a priority and Mother chose to voluntarily overlook her obligation to support Marlin. The Court in In the interest of Q.M.B, 85 S.W.3d 654,660 (WD 2002) found that "... Even if a parent is unable to pay for all of the child's financial needs, he or she has a duty to contribute as much as he or she can ... (cite omitted) Evidence that a parent was capable of employment, although unemployed, is a sufficient basis for a trial court to determine that the parent was able to

provide financial support for the child ...".

The Trial Court also found that Mother failed to provide for the child's physical, mental and emotional health and development. There is no evidence that Mother was physically unable to do so. Mother excuses this behavior because of her low IQ although she admits that Caseworker Masek verbally and in writing informed her of her rights and obligations with regard to child support and visitation. Mother's minimal visitation with Markeal in St. Louis as well as her minimal compliance with the St. Louis City DFS requirements for reunification with Markeal indicate that she was physically and mentally able to grasp the concept that visitation with her child and providing a home for her child were important. Mother voluntarily chose not to provide those things for Marlin and the evidence clearly supports the Trial Court's findings under Section 211.447.4(2)(d) R.S.Mo. that the Mother was physically and financially able to provide for the child but that she repeatedly and continuously failed to do so.

POINT V

THE TRIAL COURT DID NOT ERR IN TERMINATING THE MOTHER'S PARENTAL RIGHTS UNDER SECTION 211.447.4(3) R.S.MO. AND THE DECISION OF THE TRIAL COURT IS SUPPORTED BY SUBSTANTIAL EVIDENCE, IS NOT AGAINST THE WEIGHT OF THE EVIDENCE AND DOES NOT ERRONEOUSLY APPLY THE LAW AND, THEREFORE, THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

Mother challenges the Trial Court's findings under Section 211.447.4(3) R.S.Mo., the "failure to rectify" ground, for being legally insufficient and factually unsupported. A positive finding of one of the sub-factors is sufficient to terminate parental rights and the court does not have to make a positive finding under all four sub-factors. In the interest of A.S.O., 52 S.W.3d 59, 67 (WD 2001).

Mother, on pages 72 and 73 of her Brief, attacks the findings of the Trial Court under the main portion of Section 211.447.4(3) R.S.Mo. stating:

1) "The fact that a parent is incarcerated by itself does not support termination." The fact that Mother was currently incarcerated at the time of the TPR hearing was only one of many factors cited by the Court in its TPR decision supporting a finding that the original conditions and potentially harmful conditions continue to exist. Also cited by the Court was Mother's lack of contact with DFS, Mother's lack of contact with the child, Mother's failure to notify DFS of her change of address, and Mother's demonstrated lack of interest in the child.

2) "There was no evidence as to how long Mother was to be in prison or how that was a negative fact." Obviously, the fact that Mother is in prison is a negative fact in that she is unavailable to care for the child. The length of her prison sentence was not relevant except to the extent that the very existence of her incarceration was a repetition of the conditions which led to the original assumption of jurisdiction and an indication that Mother is unable to conform her conduct to the law.

3) "Mother's lack of income .... (Mother's) lack of a stable home ... (and) the State's

failure to provide reunification services" are the reasons that the child was not returned home. Mother's lack of income and lack of a stable home were a result of voluntary acts on the part of the Mother as discussed in Points III and IV of this Brief. The Juvenile Office asserts that the Division of Family Services did provide services to the Mother as developed more fully in Point III of this Brief.

4) "The burden was on the State to prove that termination and adoption was the only option available for the child ...". Mother provides no authority for this statement and it is certainly the Juvenile Officer's position that if the Juvenile Office proves one ground for termination of parental rights and also proves that termination is in the best interests of the child, termination of parental rights is a proper remedy. In the interest of A.S.O., supra. The Juvenile Officer is aware of no case law requiring the Juvenile Office to prove that are no other available options for placement of a child before seeking an order terminating parental rights. As mentioned previously, permanency in a child's life is a desired goal under the present state of Missouri TPR law.

Next, Mother attacks the Trial Court's findings under Section 211.447.4(3)(a) R.S.Mo. stating that the Written Service Agreement dated October, 2001 was void (JO Exh. 15). Caseworker Masek testified that during the June, 2001 telephone call with Mother, the subject of a Written Service Agreement was broached. Caseworker Masek offered to establish a Written Service Agreement with Mother over the telephone, but Mother wanted to come to the Mexico office and discuss it. When, three months later, Mother had never contacted the Division of Family Services, Caseworker Masek sent Mother a Written

Service Agreement. Through a misunderstanding, that Written Service Agreement was sent to Mother after the Court had entered its September, 2001 Order allowing Division of Family Services to cease reasonable efforts. The September, 2001 Order did not prohibit the Division of Family Services from providing reasonable efforts, but merely relieved them of the obligation to do so. If the Division desired to continue to provide reasonable efforts toward reunification, it was free to pursue that course. The fact remains that Mother signed the Written Service Agreement and returned it to Audrain County DFS in October, 2001 and Mother failed to complete even one of the minimal requirements contained in this Written Service Agreement (T 80-83).

Mother also argues that the October, 2001 Written Service Agreement was not the "social service plan" required by the statute, but rather the March 8, 2001 Children's Services Case Plan was the "social service plan" which should have been addressed by the Court. The plain language of Section 211.447.4(3)(a) R.S.Mo. states that the Court is to review the terms of the "social service plan" entered into by the parent and the Division (emphasis added). The Mother did not participate in the March 8, 2001 permanency planning review team meeting although she had the opportunity to do so. (She opted, instead, to look for a job. T 67) The only social service plan entered into by Mother and the Division was the October, 2001 Written Service Agreement. The March 8, 2001 Children's Services Case Plan was established without any input by the Mother due to her lack of interest in participating in the future of her child.

Mother then argues that the Division had an obligation to place Marlin in the St.

Louis area. As stated in the argument portion of Point III of the Juvenile Officer's Brief, the Division made numerous efforts to place the child in the St. Louis area, but there were simply no foster placements available. The Division offered to take the child to the St. Louis area to visit with Mother, but she did not make arrangements for this visit to occur. (T 122, 123). The Division offered to reimburse Mother for her gas in coming to Audrain County to visit with the child, but Mother failed to take advantage of this offer (T 72). Mother moved to St. Louis when the child was in Audrain County. She could just have easily have located in Audrain County if she wanted to continue her relationship with the child and obtain reunification with him. Mother's indifference to the child prevented her from arranging visits and the location of the child was irrelevant as Mother manifested no interest in Marlin.

Lastly, Mother attacks the Trial Court's findings under Section 211.447.4(3)(b) R.S.Mo. by alleging that no services were provided to Mother by DFS. As set forth in the Juvenile Officer's argument to Point III of this Brief, the Division of Family Services did offer numerous services to Mother, but she did not take advantage of those services. The Trial Court found that the Juvenile Officer and DFS failed in their efforts to assist the mother in providing a proper home for the child and cited as one example of this failure the fact that Mother was back in prison. No matter how many services were offered to Mother by DFS, DFS could not prevent Mother from engaging in voluntary acts which resulted in her probation being revoked and her placement back in a Department of Corrections facility.

The Trial Court made findings under the appropriate subsections of the "failure to rectify" ground, those findings were specific and, therefore, the Trial Court's decision to terminate under the "failure to rectify" ground should be affirmed.

POINT VI

THE TRIAL COURT DID NOT ERR IN TERMINATING MOTHER'S PARENTAL RIGHTS UNDER SECTION 211.447.4(6) R.S.MO. AS THE UNDERLYING TERMINATION OF PARENTAL RIGHTS ORDERS WERE VALID, FINAL JUDGMENTS WHICH CREATED AN UN-REBUTTED PRESUMPTION THAT MOTHER WAS UNFIT TO BE A PARENT AND, THEREFORE, THE DECISION OF THE TRIAL COURT SHOULD BE AFFIRMED.

The Trial Court in its January 24, 2003 TPR Judgment found that Mother was an unfit parent and that her parental rights were involuntarily terminated on four of her children by the Circuit Court of the City of St. Louis (LF 34, 35). The Trial Court took judicial notice of the May 7, 2001 City of St. Louis Orders terminating Mother's parental rights pertaining to her children, Jasmaine Natasha Williams, Daneisha Misha Robinson, Travion Jamal Robinson (Judicial Notice documents 3 and 4). All three of the St. Louis City Judgments reflect that Mother was personally served and was in default. Mother's rights were terminated in St. Louis City based upon abandonment (Section 211.447.4(1) R.S.Mo.), abuse and neglect (Section 211.447.4(2) R.S.Mo.), failure to rectify (Section 211.447.4(3) R.S.Mo.), fifteen out of twenty-two months (Section 211.447.2(1) R.S.Mo.), and the St. Louis City Court made findings on the best interest factors listed in Section 211.447.6 R.S.Mo. The St. Louis City Court found that termination of Mother's parental rights was in the best interests of the children and placed legal custody with the Missouri Division of Family Services for adoptive placement.

A finding of involuntary termination of parental rights on a sibling within a three year period immediately prior to the present termination adjudication establishes a presumption that a parent is unfit to be a party to the parent-child relationship under the provisions of Section 211.447.4(6) R.S.Mo. In order to overcome that presumption, evidence must be presented that the circumstances that led to the termination of parental rights as to the other child no longer exist or that the parent is no longer unfit. In the interest of T.A.S., 32 S.W.3d 804, 815 (WD 2000) and In the interest of A.H., 9 S.W.3d 56, 60 and 61 (WD 2000). The Court in In the interest of C.C., 32 S.W.3d 824, 830 (WD 2000) established that the burden of overcoming this presumption belongs to the parent. In the case at bar, Mother presented no evidence to meet this burden. On the other hand, the Juvenile Officer presented evidence that Mother is currently unfit as she has failed to visit with the child, she has failed to support the child, she is currently incarcerated, and she failed to cooperate with the reunification efforts of DFS. Furthermore, termination in the case at bar relies on exactly the same factors as the St. Louis City termination cases, showing a continuation of the circumstances that led to the termination of Mother's rights to Jasmaine, Daneisha and Travion.

Even though the Court found, in its January, 2003 Order, that Mother's parental rights had been terminated as to four of her children, the Juvenile Officer only pled the May, 2001 terminations on Jasmaine, Daneisha and Travion and only presented evidence with regard to those termination orders (Judicial Notice 3 & 4). The termination of Mother's rights to Markeal occurred in St. Louis City after the filing of the Audrain County

TPR Petition and as such, was not relevant under the provisions of Section 211.447.4(6) R.S.Mo. The finding of a termination as to a fourth child is harmless error on the part of the Trial Court.

Mother's Point Relied On does not address the issue of whether Mother is presently fit or unfit to parent the child or whether her circumstances have changed since May, 2001, and thus the Court must assume that Mother concedes her unfitness to parent Marlin. Rather than to challenge the facts in evidence, Mother reverts to challenging the May, 2001 St. Louis City TPR Judgments based on allegations that DFS did not provide reasonable efforts to reunify Mother with her three children by finding her housing and income and that DFS failed to provide her with special services because of her IQ. Mother restates many of the same "facts" relied on by her in earlier portions of her brief - all without transcript citations. The Juvenile Officer would point out that Mother once again misquotes St. Louis City Caseworker Pelton by claiming that St. Louis City DFS did not provide reunification services to Mother because she did not have stable housing when, in fact, Ms. Pelton testified that Mother's lack of stable housing made her ineligible for one program - intensive in-home supervision (T 168, 169). Mother states on page 81 of her brief that Mother's efforts in obtaining housing and getting increased visitation with Markeal in February, 2002, were "rewarded" by having all her rights to visitation stopped by an exparte order because she lived in a poor part of St. Louis. There is no evidence that her visitation was stopped because she lived in a poor part of St. Louis, rather the evidence is that the home in which she was living was suspected to be a drug house and her visitation was not

stopped, rather, by order of the St. Louis Court in February, 2002, she was given eight hours of unsupervised visitation per week with Markeal. (T 189, T 179). Also, Mother faults DFS for not having a psychological evaluation performed when Jasmaine, Daneisha and Travion came into care and for not knowing, at that time, that Mother's IQ was low. Mother asserts that "Any one using due diligence would have known that she was having difficulty with her understanding of what was taking place" (page 81 of Mother's brief). There is absolutely no evidence that Mother did not understand why she lost custody of her children or what she had to do in order to regain custody.

As stated above and in earlier portions of this brief, the Juvenile Office disputes many of the allegations made by Mother in support of her conclusion that DFS failed to provide her with reasonable efforts for reunification with Jasmaine, Daneisha and Travion. However, the Juvenile Officer takes the position that under the provisions of Section 211.447.4(6) R.S.Mo., the efforts expended by DFS in connection with Mother's reunification with Jasmaine, Daneisha and Travion are irrelevant in Marlin's case. These were final judgments almost two years old at the time of the entry of the Audrain County TPR Order on Marlin and not subject to collateral attack. Mother, in her argument, makes no distinction as to time in her litany of complaints against DFS and that is because evidence presented in Marlin's trial as to services provided by St. Louis City DFS and Audrain County DFS focused on efforts expended by DFS after Marlin came into care. The Juvenile Officer did not attempt to resurrect detailed evidence with regard to the services provided to Mother in connection with Jasmaine, Daneisha and Travion as termination of

parental rights in connection with those three children was an accomplished fact at the time the TPR petition was filed in Marlin's case.

In addition to criticizing what Mother deems to be a lack of services provided to Mother, Mother also criticizes the St. Louis City Court's failure to appoint her an attorney and challenges the sufficiency of the findings contained in the St. Louis City May, 2001 TPR Judgments. It is simply too late to challenge the validity of the May, 2001 St. Louis City Orders. Missouri Supreme Court Rules 75.01 and 119.07 give the Trial Court the right to retain control over judgments during the 30 day period after entry. Section 211.261 R.S.Mo. requires an appeal to be filed within 30 days after the final judgment, order or decree has been entered. No appeal was filed by Mother and thus, the judgments are now final. Missouri Supreme Court Rule 74.06(b) and (d) provide the only means available for setting aside a final judgment. Under Missouri Supreme Court Rule 74.06(b), a final judgment may be set aside for 1) a mistake, inadvertence, surprise or excusable neglect; or 2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation or other misconduct of an adverse party. Under Missouri Supreme Court Rule 74.06(d), the court may set aside a final judgment for fraud upon the court. Mother, in her argument on this Point VI, has not challenged the finality of the judgments under Rule 75.01 nor has she ever filed any lawsuit to set aside the three May, 2001 St. Louis City TPR Orders under Rule 74.06. Thus, the St. Louis City TPR Orders are final and cannot be challenged in this Court. The Mother in the case of In the interest of C.C., 32 S.W.3d 824 at 828 makes a similar argument in challenging the validity of the underlying Pennsylvania TPR order stating that there was no evidence that the underlying TPR court provided Mother

with an attorney, an opportunity to have an attorney, an opportunity to be present at the hearing, proper service, or notification of the hearing. The Western District noted at page 829 that a foreign judgment is presumed to be valid and the burden of challenging the validity of the judgment is on the person resisting the recognition of the judgment. Clearly, if a foreign judgment is presumed to be valid, a Missouri judgment is presumed to be valid. Mother does not meet any type of burden in challenging the validity of the judgments entered by the St. Louis City Court in May, 2001 and thus, they must be presumed to be valid judgments.

The May, 2001 St. Louis City TPR Judgments on Jasmaine, Daneisha and Trevion were valid judgments and the entry of those judgments allowed the Audrain County Juvenile Court to presume Mother to be unfit to be a party to the parent-child relationship. Mother presented no evidence to rebut that presumption and the Juvenile Officer presented a plethora of evidence to support a finding of her unfitness to parent Marlin. Therefore, the Court's decision to terminate Mother's parental rights under Section 211.447.4(6) R.S.Mo. was appropriate.

CONCLUSION

The Trial Court terminated the Mother's parental rights under the following grounds: fifteen out of twenty-two months, abandonment, abuse and neglect, failure to rectify and parental unfitness. The Court made appropriate findings under each of these grounds and once those findings were made, went on to make findings under each factor of the best interest section of the statute. Mother's parental rights to three other children had been involuntarily terminated, Mother never saw Marlin or communicated with him after her release from prison

in February, 2001, Mother never paid any voluntary support for Marlin, never provided him with any gifts, clothing, telephone calls, or letters. Mother could not conform her conduct to the law and found herself back in prison on a parole violation. Mother was simply not interested in providing a home for or a relationship with Marlin. He needs a safe, permanent and stable home and the evidence shows that Mother cannot provide him with that home. For all of the foregoing reasons, the Juvenile Officer respectfully requests this Court to affirm the decision of the Trial Court in terminating Mother's parental rights.

Respectfully submitted,

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IN THE MISSOURI SUPREME COURT

In The Interest Of:

MARLIN DEVOINION ROBINSON

Supreme Court No. 85208
Audrain County Case No. JU102-8TC

CERTIFICATE OF COMPLIANCE

Comes now Carla Wood Tanzey, attorney for Respondent Juvenile Office of Audrain County, and certifies that the Brief being filed in response to Appellant Lisa Williams' Brief, complies with the requirements of Rule 55.03 and the limitation as set forth in Rule 84.06(b) and 84.06(g).

1. That the word count for said brief is 13,118 inclusive.

2. That the Disk upon which the Brief has been placed has been scanned for virus and is virus free.

3. That all parties have been sent two copies of Respondent's Brief by depositing one copy of the Brief and one disk containing said Brief in the U.S. Mail, postage prepaid, addressed to the attorneys of record at their business address as set forth in the proof of service.

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TANZEY and CLAMPITT, P.C.

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Audrain County Case No. JU102-8TC

CERTIFICATE OF SERVICE

I hereby certify that one (1) true and correct copies of the above and foregoing Brief of Respondent Audrain County Juvenile Office and a disk containing said Brief were mailed, postage prepaid, this 17th day of September, 2003, to the parties listed below at the address shown.

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IN THE MISSOURI SUPREME COURT

In The Interest Of:

MARLIN DEVOINION ROBINSON

LISA WILLIAMS,
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AUDRAIN COUNTY JUVENILE OFFICE
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JAY NIXON in his official capacity of
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APPENDIX

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